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No. 1037

In the Supreme Court of the United States

October Term, 1962

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v.

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1097

SAMUEL JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1963. On May 8, 1963, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including May 14, 1963, and the petition was filed on that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court erred in allowing the jury to continue deliberating after the foreman had in-

formed the judge that the jury was unable to reach a decision at that time in that one juror had a reasonable doubt.

STATEMENT

After a two-day trial in the United States District Court for the District of Columbia, petitioner was convicted of housebreaking, larceny and destroying movable property, and sentenced to a term of two to six years. The jury, which had retired to deliberate at approximately 5:20 p.m. on the second day, was dismissed for the night at 6:05 p.m. and told to return the following day, May 29, at 10:00 a.m. At 12:15 p.m. on May 29, the foreman delivered to the judge the following note (J.A. 49):[1]

> After analyzing the testimony of the Newman and James trial we have been unable to reach a group decision at this time. One juror continues to have a reasonable doubt.

After conferring with counsel, the court denied defendant's request for a mistrial and, without responding to the foreman's note, allowed the jury to continue deliberating (J.A. 48–49). At 3:00 p.m., the jury returned with a verdict of guilty.

ARGUMENT

The decision of the trial court to allow the jury to continue deliberating after they had announced that they were unable to agree was entirely proper. *John-*

[1] "J.A." refers to the Joint Appendix to petitioner's brief in the court of appeals. Some of the information, especially that referring to the length of time that the jury deliberated is not contained in the Joint Appendix. This information can be found in the complete transcript at pp. 317–319, 331–340.

son v. *United States,* 270 F. 2d 721, 725 (C.A. 9). The length of time during which a jury shall be kept together is within the sound discretion of the trial court. *Mendelson* v. *United States,* 58 F. 2d 532, 535 (C.A.D.C.). At the time the jury here notified the court of its inability to agree, it had deliberated merely three hours in a case involving three counts and two defendants. Moreover, the foreman's note showed on its face that the jury was not hopelessly deadlocked, for it stated merely they were unable to reach a decision "at this time".

Petitioner makes much of the fact that the note revealed the jury's 11–1 division on at least one of the issues before it. The law, however, condemns only a judge's inquiry of a jury as to how it is divided, *Brasfield* v. *United States,* 272 U.S. 448, and even then only if substantial rights of the defendant are affected. *Beale* v. *United States,* 263 F. 2d 215 (C.A. 5); *Butler* v. *United States,* 254 F. 2d 875 (C.A. 5). Clearly, the unsolicited information by the foreman was not sufficient cause for the court to declare a mistrial.

In declining to give further instruction the judge remained completely neutral, leaving the course of the deliberations and the ultimate outcome completely in the jury's hands on the proper instructions given at the close of the trial. A juror who felt coerced by such conduct "would have lacked all independence of mind; would have been no better than a sounding board for any judicial whisper." *United States* v. *Olweiss,* 138 F. 2d 798, 801 (C.A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

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v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

No. 1097

SAMUEL JAMES, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

Now comes Samuel James, petitioner herein, and moves the Court for a rehearing of petitioner's petition for a writ of certiorari. The petition for certiorari was denied June 17, 1963.

There is involved in this petition for rehearing a point not passed upon by this Court in the original petition for writ of certiorari. Petitioner was represented by certain counsel in the trial court, and by other counsel in the United States Court of Appeals for the District of Columbia Circuit. The petition for a writ of certiorari was filed by still another counsel. Counsel in this petition for rehearing desires to point out to this Court that he has carefully studied the stenographic transcript of proceedings in the cause and in counsel's judgment there is a serious and substantial question—in fact a constitutional question—that should be determined by this Court.

Petitioner was convicted in the court below of the offenses of housebreaking, larceny and destroying movable property and was sentenced to a term of two to six years. During final argument the Assistant United States Attorney in our judgment brought to the attention of the jury, at least by inference, that the petitioner had not taken the stand in his own defense. At Page 292 of the transcript of the trial the following occurred:

> "Mr. Smithson: When he was here in the District of Columbia, what was the conversation he had with Sergeant Gray? He stated he was with Piggy James on December 13 and December 14th. He was with Junious and Piggy on the 13th. He said he knew there was a safe in the basement of 610 53rd Street, Northeast and he was related to the complainant, and that he admitted with riding around with Piggy and Junious in Junious' Cadillac the day before the safe job.
>
> He was asked at that time whether or not he had received $500.00 or less for his part, and asked whether he received $500.00 or less for his part in this particular job and he shook his head. There is no denial.
>
> Mr. Bonner: Just a minute.
>
> The Court: The jury will disregard that.
>
> Mr. Smithson: Your Honor, I think it is a reasonable assumption to be drawn.
>
> Mr. Bonner: Approach the bench, please.
>
> At the Bench in a Low Monotone:
>
> Mr. Bonner: When he reiterates the fact the defendant has not denied that he has caused a mistrial.
>
> Mr. Smithson: In what respect?
>
> Mr. Bonner: I do not want these people cloaked. I want this case tried as it should be. I think Mr. Smithson that you should be—
>
> Mr. Smithson: I personally phrased that question exactly as it was asked. It was asked in that phraseology—did you get $500.00?

THE COURT: Wait just a minute. The Court understands that you just got through saying there was no denial?

MR. SMITHSON: That is correct, Your Honor.

THE COURT: The Court feels it is entirely proper."

In the Federal courts of course it is recognized that an accused in a criminal proceeding has a right to remain silent and it necessarily follows that no inference can arise over his failure to take the stand. It is improper for the prosecuting official to comment on the failure of the accused to take the stand. Such comment would constitute reversible error. We believe it also follows that if reference is made, even indirectly, to the failure of a co-defendant to take the stand, that would constitute reversible error. It would create in the jury's mind a suspicion or an inference as to the reason another defendant or defendants did not take the stand. We believe *United States* v. *Cohen*, 177 F. 2d 523, has application here. In that case the court said:

> "Generally it is within the discretion of trial court to determine whether or not prosecutor's invective, based on evidence and inference flowing therefrom, exceeds limits of professional propriety. * * *."

We desire to again ask the Court to reconsider the Court's denial of certiorari based on the incidents at the trial wherein the jury had stated to the court the jury's division as to the guilt of the defendant, petitioner herein. It is contended under the cases cited that a mistrial should have been declared. In order that this matter may be set forth in its proper setting, we desire to point out that at Page 322 of the transcript of proceedings the following occurred:

> "MR. SMITHSON: * * * That had to do with the fact that they were split eleven to one on some issue, * * *.
>
> MR. HUGHES: Our position is, at least with me, representing James, is that your Honor should declare a mistrial. Because it has been called to the Court's

attention by the Jury Foreman, notwithstanding the jury, that eleven of the jurors—excuse me.

It has been called to the attention of the Court that they cannot arrive at a verdict. Your Honor has permitted them to deliberate after receiving that information. We say that in substance the Court is pressuring the jury into returning a unanimous verdict. For that reason, we ask your Honor to declare a mistrial.

THE COURT: That motion will be denied.

• • •

MR. BONNER: I am going to ask for a mistrial on the basis of misconduct of the jurors, in that one of the jurors, without being solicited and without asking for information, merely communicated to the Court that the jury was eleven to one for conviction.

THE COURT: No, wait just a moment. You make reference now to the Foreman?

MR. HUGHES: Speaking for the panel—

MR. BONNER: Whoever sent the note.

THE COURT: Wait just a moment. You have the note. The note is in the file.

MR. BONNER: No, I don't have it.

MR. HUGHES: I don't have the note. Your Honor read the note. We never saw it.

THE COURT: I put it right in the file.

MR. BONNER: Of course you did.

THE COURT: Now this is not a member of the jury. This is the Foreman.

MR. HUGHES: Yes, speaking for the petit jury.

THE COURT: Put it on the record as such.

MR. BONNER: I will put on the record the person J. H. Linsley, who is Foreman of this jury, has by his misconduct in informing the Court as to how the jury stands, numerically, and as to the guilt or innocence of the defendants, is ground for mistrial, sir.

MR. SMITHSON: Misconduct must be knowing misconduct. Inadvertently the juror has made a statement which cannot be charged to him. I don't say that this is such misconduct unsolicited as requires a mistrial.

THE COURT: The Court feels that there is absolutely no misconduct."

In our judgment *Brasfield* v. *United States*, 272 U.S. 448, in effect supports our position. When it was announced that the jury was divided eleven to one, we believe that further deliberation would have the effect of coercing the dissenting member of the jury. Due to the serious question involved, it is our contention that a mistrial should have been declared.

I certify that this petition for rehearing is filed in good faith and not for the purpose of delay, and we further certify that the petition for rehearing is restricted to the grounds specified.

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